MICHAEL D. HESS
Corporation Counsel of the City of New York
Attorney for the City of New York
Department of Parks and Recreation
100 Church Street, Room 6-133
New York, New York 10007
(212) 788-0843
Gabriela P. Cacuci (GC-4791)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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HEARING DATE: 1/19/01
TIME: 10:00 A.M.

In re:

RANDALL'S ISLAND FAMILY GOLF CENTERS, INC., et al.,

Debtors.
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Chapter 11

Case Nos. 00 B 41065 through 00 B 41196 (SMB)

OBJECTION OF THE CITY OF NEW YORK DEPARTMENT OF PARKS AND RECREATION TO THE DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTIONS 105, 363, 365 AND 1146 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 6004, 6006 AND 6007 AUTHORIZING, INTER ALIA, THE ASSUMPTION AND ASSIGNMENT OF CERTAIN LEASEHOLD INTERESTS, APPROVING THE FORM OF SALE AND ASSIGNMENT AGREEMENT, APPROVING THE SALE OF PERSONAL PROPERTY AND LEASEHOLD INTERESTS FREE AND CLEAR OF LIENS, PURSUANT TO SECTION 363 OF THE BANKRUPTCY CODE, AND DEEMING SUCH SALES EXEMPT FROM STAMP OR SIMILAR TAXES UNDER § 1146(c) OF THE BANKRUPTCY CODE AND, IN THE EVENT THE PROPERTIES REMAIN UNSOLD, AUTHORIZING THE REJECTION AND ABANDONMENT OF THE UNSOLD LEASEHOLD INTERESTS

The City of New York Department of Parks and Recreation (the "City"), by its counsel, Michael D. Hess, Corporation Counsel of the City of New York, hereby submits this Objection to the Debtors' Motion dated January 11, 2001 for an Order Pursuant to Sections 105, 363, 365 and 1146 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006 and 6007, Authorizing, inter alia, the Assumption and Assignment of Certain Leasehold Interests, the Sale

of Personal Property, Free and Clear of Liens, Claims, Encumbrances, and Interests and Exempt From Any Stamp, Transfer, Recording or Similar Tax, Approving the Form of Sale and Assignment Agreements, and In The Event That Properties Remain Unsold, Approve the Rejection and Abandonment of Unsold Leasehold Interests, and other related relief (the "Motion"), for the reasons set forth below:

BACKGROUND

1. On May 4, 2000 (the "Petition Date"), each of the above-captioned debtors and debtors-in-possession (the "Debtors") filed with this Court a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). The Debtors' Chapter 11 cases have been jointly administered but have not been substantively consolidated.

2. The Debtors operate golf, ice skating and family entertainment centers throughout North America and Canada. The Debtors owned and/or operated approximately 100 golf facilities and 17 ice skating and family entertainment centers. Pursuant to orders of this Court, the Debtors have disposed of some of their assets during the course of these Chapter 11 cases.

3. By Motion dated June 16, 2000, the Debtors sought an order extending the time within which to assume or reject certain licenses under § 365(d)(4) of the Bankruptcy Code.[1] The Debtors' last extension of the time within which to assume or reject their licenses,

[1] The City objected to this motion by Objection filed on July 5, 2000. The Court granted the Debtors' motion over the City's and other landlords' objections based on the Debtors'

Continued…

was due to expire on January 8, 2001. At a hearing held on January 4, 2001, the Court adjourned the Debtors' motion to February 6, 2001 and extended the Debtors' time within which to assume or reject the licenses until that time.

4. Subsequently, the Debtors sought to obtain up to $3.6 million in new funds and the use of up to $3 million in proceeds from asset sales as additional post-Petition financing, having fully utilized the $15 million dollars available under the DIP credit agreement. The Debtors' additional financing was required in order to prevent the Debtors' operations from "going dark" and to assist the Debtors in liquidating their assets as a going concern.

5. Unable to obtain the financing sought, following a hearing on January 11, 2001, the Debtors have determined that they can no longer continue in business as a going concern and that an immediate sale of all of their remaining assets is in the best interests of the creditors and the estates.

THE DEBTORS' MOTION

6. Consequently, by this Motion, the Debtors seek authority to sell and assign the Debtors' fee-owned properties ("Owned Properties"), their leased properties ("Leases", and collectively with the Owned Properties, the "Properties"), as well as the personal property located at the Properties (the "Personal Property") at an omnibus sale hearing (the "Sale Hearing") to be held on or about February 9, 2001.

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representations that they would remain current in their post-Petition payments to the landlords under their various licenses and leases. The Debtors made post-Petition payments to the City until January, 2001.

7. Moreover, in the event that any of the Leases or Personal Property relating thereto remains unsold at the conclusion of the Sale Hearing, the Debtors seek authority to reject and abandon any unsold Leases and Personal Property.

8. As will be shown below, the Debtors have three licenses or concessions with the City (the "City Licenses") and the City's Objection to the Motion is three-prong: (A) the City objects to the assumption and assignment of the City Licenses absent cure of the existing defaults; (B) the City objects to the assumption and assignment of the City Licenses on the ground that such licenses cannot be assigned without the Commissioner's prior written consent and, even if they are assigned, such licenses are terminable at will by the Commissioner upon assignment, in accordance with their respective terms; and (C) the City objects to the Debtors' request to have the sales of inventory and/or any other transfer of the Debtors' assets deemed exempt from City stamp or similar taxes (the "City Transfer Taxes") pursuant to § 1146(c) of the Bankruptcy Code because such exemption is not applicable either to sales of personal property or to any transfers of real estate assets taking place prior to the confirmation of a plan of reorganization.

9. The City is filing its Objection at this time, in connection with the hearing on the bidding procedures because the Debtors and any potential bidders should be aware of the fact that, unless a bidder has already been approved by the City in writing, in accordance with the City's procurement process, such bidder risks to have its rights in the City Licenses terminated immediately upon assignment and its purchase price forfeited because of the illegality of the assignment and the fact that the City Licenses are terminable at will. Accordingly, the City objects to the approval of the form of contract assignment proposed by the Debtors (Exhibit C to the Motion), unless such contract contains the following or similar language:

NOTICE TO ALL PURCHASERS.

IF YOUR BID IS FOR LICENSES GRANTED TO THE DEBTORS BY THE CITY OF NEW YORK DEPARTMENT OF PARKS AND RECREATION IDENTIFIED ON THE DEBTORS' LIST OF ASSETS AS NY 2 (DREIER-OFFERMAN), NY 4 (ALLEY POND) OR NY 21 (RANDALL'S ISLAND), PLEASE BE ADVISED THAT THE PROCUREMENT RULES OF THE CITY OF NEW YORK PROHIBIT ASSIGNMENT OF SUCH LICENSES WITHOUT THE PRIOR WRITTEN CONSENT OF THE COMMISSIONER OF PARKS AND RECREATION AND ANY ASSIGNMENT IS TERMINABLE AT WILL BY THE COMMISSIONER OF PARKS AND RECREATION.

THE DEBTORS' LICENSES WITH THE CITY

Randall's Island License Agreement

10. On November 5, 1990, the City, as licensor, entered into a License Agreement with American Golf Corporation, as licensee, for the construction and operation of the Randall's Island recreation facility (the "Randall's Island License Agreement") for a term of fifteen (15) years from the Commencement Date, as defined in Article III thereof. On March 3, 1997, American Golf Corporation assigned the Randall's Island License, with the City's consent, to Randall's Island Family Golf Centers, Inc., one of the Debtors herein. As of the date of the assignment, Randall's Island Family Golf Centers, Inc. was a wholly owned subsidiary of Family Golf Centers, Inc. ("Family Golf").

11. Among its obligations under the Randall's Island License Agreement, the licensee agreed to pay a minimum annual license fee in the amount of $500,000, adjusted as set forth in Article IV of the agreement, and any applicable late charges thereon. The license fees and any late charges were to be paid in quarterly installments on August 15, November 15, April 15 and June 15. As security for any defaults under the license agreement, the licensee provided the City, as beneficiary, with a letter of credit (No. P-270221 dated April 18, 1997) in the amount of $150,000.[2]

12. The City has advised me that Family Golf had defaulted pre-Petition by failing to make the April 15, 2000 quarterly payment in the amount of $143,233.43. As a result, the City had to draw down on the $150,000 letter of credit serving as security. I was also advised by my client that Family Golf had made a subsequent post-Petition payment of $98,988.33 for the accrued post-Petition period (May 5-June 15, 2000), but that despite this payment, an unpaid pre-Petition balance of $34,670.00 remains due and payable to the City.

13. In addition, Article VI of the General Provisions at page 6, paragraph (c), requires the licensee to restore the security deposit "to the original sum deposited" within five (5) days after written demand therefor. Upon information and belief, Family Golf has failed to replenish the security deposit in the amount of $150,000.

[2] Article XII of the Randall's Island License Agreement provides that the General Provisions annexed to the agreement as Exhbit A (the "General Provisions") are incorporated in the agreement. Article XXXIX of the General Provisions, at page 26 provides that "[i]mmediately upon Licensee's receipt of monies from all operations under this license, the percentage of monies belonging to the City, as provided, shall immediately vest in and become the property of the City and are hereby deemed to be trust funds and are to be held by Licensee as trustee for the benefit of City until the said funds are paid over and delivered to Commissioner."

Alley Pond License Agreement

14. On September 9, 1994, the City, as licensor, entered into a License Agreement with Orient Associates International, Inc., as licensee, for the operation of the Alley Pond Park Driving Range and Miniature Golf Center (the "Alley Pond License Agreement") for a term of twelve (12) years from the Commencement Date, as defined thereof. On December 16, 1996, Orient Associates International, Inc. assigned the Alley Pond License, with the City's consent, to Family Golf, one of the Debtors herein. The Alley Pond License Agreement was modified effective January 1, 1999.

15. Among its obligations under the Alley Pond License Agreement, the licensee agreed to pay minimum annual license fees in the amount of $1 million (for the years 2000-06) payable in equal monthly payments of $83,333.33. As security for any defaults under the license agreement, the licensee provided the City, as beneficiary, with a letter of credit (No. T-249827 dated October 25, 1995) in the amount of $250,000. See Article VI of the General Provisions at page 4.[3]

16. The City has advised me that Family Golf had defaulted pre-Petition by failing to make a timely May, 2000 payment. As a result, the City had to draw down on the $250,000 letter of credit serving as security. I have also been advised by my client that the

[3] Article XII of the Alley Pond License Agreement provides that the General Provisions annexed to the agreement as Exhibit A (the "General Provisions") are incorporated in the agreement. Article XXXIX of the General Provisions, at page 24 provides that "[i]mmediately upon Licensee's receipt of monies from all operations under this license, the percentage of monies belonging to the City, as provided, shall immediately vest in and become the property of the City and are hereby deemed to be trust funds and are to be held by Licensee as trustee for the benefit of City until the said funds are paid over and delivered to Commissioner."

Debtor subsequently made a partial May, 2000 payment in the amount of $75,268.81 for the May post-Petition period, and a full payment in the amount of $83,333.33 for the month of June, 2000.

17. Article VI of the General Provisions of the Alley Pond License Agreement at page 6, paragraph (c), requires the licensee to restore the security deposit "to the original sum deposited". Upon information and belief, Family Golf has failed to replenish the security deposit to its original amount. Because the Debtor's May payment did not cover the May pre-Petition period, the City has a shortfall in its security deposit which is presently in the amount of $241,935.48, instead of $250,000.

18. In addition, the Debtor failed to remit the monthly license fee in the amount of $83,333.33 which was due on January 1, 2001. By letter dated January 5, 2001, the Debtor was advised of its default.

The Dreier-Offerman License Agreement

19. On April 21, 1998, the City, as licensor, entered into a License Agreement (the "Dreier-Offerman License Agreement") with Brooklyn Family Golf Centers, Inc.[4], as licensee, for the construction, operation, management and maintenance of the Dreier-Offerman Park Golf and Recreation Center (the "Recreation Center") located between Coney Island Creek and the Belt Parkway, in the Borough of Brooklyn.[5]

[4] Brooklyn Family Golf Centers, Inc. is a wholly owned subsidiary of Family Golf Centers, Inc.

[5] A copy of the License Agreement is being provided to the Court and can be made available to parties in interest upon request.

20. The Dreier-Offerman License Agreement is for a term of twenty (20) years beginning "on the day the Licensee opens any portion of the Licensed Premises to the public for business or March 31, 1999, whichever is earlier" defined, in Article III of the License Agreement as the "Commencement Date".

21. Article I of the Dreier-Offerman License Agreement (at page 3) required the Licensee to "obtain any and all approvals, permits, and other licenses required by federal, state and City laws, rules, regulations and orders which are or may become necessary to operate the Licensed Premises in accordance with the terms of this License".

22. Article V of the Dreier-Offerman License Agreement (at page 13) provided that the "Licensee shall spend or cause to be expended during the Term of this License, a minimum of $4,000,000 for Capital Improvements as defined in Article II [of the License Agreement]…. Licensee shall perform and complete all Capital Improvements at its sole cost and expense and in accordance with designs and plans approved by Parks and other governmental authorities having jurisdiction."

23. Article V, paragraph 5.2 of the Dreier-Offerman License Agreement (at page 14) also provided for the Licensee's payment to the City of a $40,000 Design Review Fee, representing one percent of the amount of the Capital Improvements. Licensee was to make supplementary payments upon the Final Completion of the Capital Improvements. Id.

24. Under paragraph 5.4 of the Dreier-Offerman License Agreement (at page 14), Licensee was to Finally Complete all Capital Improvements "no later than the dates indicated in Exhibit B" to the License Agreement, unless work could not be completed "due to

circumstances beyond the control of Licensee including acts of God, war, … or other similar circumstances which the Commissioner has determined to be beyond the control of Licensee."

25. Exhibit B to the Dreier-Offerman License Agreement described the Phase I and Phase II Capital Improvements that had to be completed by the Licensee, the Licensee's due date for completion of such Capital Improvements, and the expenditures required to be made by the Licensee. According to Exhibit B, Phase I had to be completed by September 30, 1998 and required a minimum capital expenditure of $567,000, and Phase II had to be completed by March 30, 1999 and required a minimum capital expenditure of $3,433,000, for a total expenditure of $4 million during both phases of construction.

26. Phase I included the design and development activities and the relocation of the existing soccer fields. The Licensee had to obtain approval for "all design and schematic plans and drawings for all Capital Improvement activities" including design review by Parks staff and by the City's Municipal Art Commission. Phase II included the construction of a driving range, a clubhouse, a garden style miniature golf course, batting cages, domed in-line skating facility and a picnic/promenade/circular drive and parking lot.

27. The Dreier-Offerman License Agreement at paragraph 5.9 (page 17) provided that "Licensee shall commence Capital Improvements only after the issuance of a construction permit from Parks" and that "Licensee shall notify Commissioner of the specific date on which construction shall begin." Also, under paragraph 5.7 of the License Agreement (at page 16) "[n]o Capital Improvements shall be deemed Finally Completed until the Commissioner certifies in writing that the Capital Improvement has been completed to his satisfaction."

28. Paragraph 5.6 of the Dreier-Offerman License Agreement made clear that "Licensee's failure to comply with any phase of the schedules for Capital Improvements for a period of thirty days following notice shall constitute a default upon which Commissioner may terminate this License by giving ten days notice."

29. Article IV of the Dreier-Offerman License Agreement provided for a minimum annual fee to the City of $800,000, "beginning on the Commencement Date and continuing on or before the first day of each month of each Operating Year in the amounts set forth in the Schedule of Minimum Annual Fee Payments, annexed as Exhibit F" to the License Agreement. In addition, paragraph 4.4 of the same article provided for the payment of a security deposit in the amount of $275,000, as provided in Article VI of the General Provisions. [6]

30. Article I, paragraph 1.2 of the Dreier-Offerman License Agreement also states that "[i]n order to be in compliance with this License Agreement, Licensee must fulfill all of the obligations contained [therein]. Commissioner may deem as a default Licensee's failure to fulfill such obligations for any reason, upon any applicable notice and any applicable cure period."

A. The Debtors Must Cure The Existing Defaults Before It Can Assume and Assign the Licenses

Randall's Island and Alley Pond

31. As shown above, both monetary and non-monetary defaults exist with respect to the Debtors' licenses with the City. Before the Debtors can assume and assign the

[6] Article XIV of the License Agreement provides that the General Provisions annexed to the agreement as Exhibit A (the "General Provisions") are incorporated in the agreement.

Randall's Island and Alley Pond licenses, all existing pre-Petition and post-Petition monetary defaults must be cured. Thus, as shown, with respect to Randall's Island, the security deposit in the amount of $150,000 must be replenished, and with respect to Alley Pond, the shortfall of $8,064.52 in the security deposit must be replenished and the past due January, 2001 payment must be made.

Dreier-Offerman

32. Since the Debtors' license regarding the Dreier-Offerman park involves construction, the City assumes that the Debtors' present financial condition makes it impossible for the Debtors to cure the existing defaults with respect to Dreier-Offerman.

33. Even though, as shown above, the License Agreement required that both Phase I and Phase II be completed by March, 1999, more than a year ago, construction has not even begun at the Dreier-Offerman Park. Upon information and belief, the only activity undertaken to date by the Debtor under the License Agreement is the payment of the Design Review Fee of $40,000 in May, 1998 and the presentation of its designs and plans for the Recreation Center to the City Art Commission, which approved such designs and plans on May 8, 2000.

34. By letter dated May 16, 2000, the City advised the Debtor that in order to commence prompt construction under Phase II of the License Agreement, the Debtor had to file all necessary applications with the Buildings Department by June 16, 2000, respond to any comments from the Buildings Department by July 16, 2000, and obtain work permits by August 16, 2000. In the same letter, the City advised the Debtor that failure to obtain work permits by August 16, 2000 may result in the termination of the License Agreement.

35. I have been advised by the City that a meeting took place on June 7, 2000 between the Debtor and the City at which time the Debtor advised the City that it did not intend to proceed with the construction of the Dreier-Offerman Recreation Park. I have also been advised that the Debtor subsequently failed to file its applications with the Buildings Department by June 16, 2000.

B. The City Licenses Cannot Be Assigned Without the City's Prior Consent and Approval

36. All City Licenses are "terminable at will by the Commissioner in her sole and absolute discretion at any time she deems it to be in the best interest of the City and such termination shall be effective after thirty (30) days written notice to Licensee." See, e.g., Article III, at page 11 of the Randall's Island License Agreement, Article III at page 9 of the Alley Pond License Agreement, and Article III at page 8 of the Dreier-Offerman License Agreement.

37. The City Licenses unequivocally state that they do not constitute leases but merely licenses or concessions. They expressly provide that "no land, building, space, improvement, or equipment is leased to Licensee, but that during the Term of the license, Licensee shall have the use of the Licensed Premises for the purpose herein provided and except as herein provided, Licensee has the right to occupy the premises assigned to it and to operate the Licensed Premises, and to continue in possession thereof only so long as each and every term and condition in this license is strictly and properly complied with and so long as this license is not terminated by Commissioner." See, e.g., Article II of the General Provisions of the Alley Pond License Agreement, Article II of the General Provisions of the Randall's Island License Agreement and Article II of the General Provisions of the Dreier-Offerman License Agreement.

38. The City Licenses make clear that they are contracts personal to the named licensee. For example, the Dreier-Offerman License Agreement provides at ¶ 7.11, page 26 that

"[a]n officer of the Licensee shall personally operate this License or employ an operations manager ("Manager") at the Licensed Premises satisfactory to Commissioner."

39. The City Licenses prohibit the assignment or transfer of the licenses without the Commissioner's prior written approval. For example, Article X at page 33 of the Alley Pond License Agreement states in part:

> 10.1 (a) No assignment or other transfer of any interest in this License Agreement shall be permitted which … would have the effect of changing the ownership or control, whether direct or indirect, of more than forty-nine (49%) of stock or voting control of Licensee in the Licensed Premises without the prior written consent of Commissioner. Licensee shall present to Commissioner the assignment or sublicense agreement for approval, together with any and all information as may be required by the City for such approval, including a statement prepared by a certified public accountant indicating that the proposed assignee or sublicensee has a financial net worth acceptable to the Commissioner together with a certification that its principal business activity will consist of the management and operation of the Recreation Facility. The constraints contained herein are intended to assure the City that the Licensed Premises are operated by persons, firms or corporations which are experienced and reputable operators and are not intended to diminish Licensee's interest in the Licensed Premises or to create any rights to payment as a condition of the granting of any required consent or approval. (Emphasis added)

See also Article X at page 43 of the Randall's Island License Agreement and Article XI at page 35 of the Dreier-Offerman License Agreement.

40. A similar provision is found in Article III of the General Provisions of the Alley Pond License Agreement:

> Prohibition Against Transfer. Licensee shall not sell, transfer, assign, sublicense or encumber in any

> way this License hereby granted, a majority of the shares of Licensee, or any equipment furnished as provided herein, or any interest therein, or consent, allow or permit any other person or party to use any part of the Licensed Premises, building, space or facilities covered by this license, nor shall this license be transferred by operation of law, unless approved in advance in writing by Commissioner, it being the purpose and spirit of this License Agreement to grant this license and privilege solely to Licensee herein named.

See also Article III of the General Provisions of the Randall's Island License Agreement and Article III of the General Provisions of the Dreier-Offerman License Agreement.

41. These prohibitions against assignment are enforceable under § 365(c) of the Bankruptcy Code. That section provides that "[t]he trustee may not assume or assign an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if

> (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties;
>
> and
>
> (B) such party does not consent to such assumption or assignment; (emphasis added)

See In re Grove Rich Realty Corp., 200 B.R. 502 (Bankr. E.D.N.Y. 1996) (analyzing the interplay between §§ 365(f) and 365(c) of the Bankruptcy Code and holding that a purchase money mortgage which could not be assigned under the applicable non-bankruptcy law could not be assigned under § 365(f) of the Bankruptcy Code); In re Pan Am Corp., 1991 Bankr. LEXIS

1063 (Bankr. S.D.N.Y. 1991) (lease with Port Authority held assignable only with the landlord's consent).

42. The Procurement Policy Board Rules of the City of New York require that contracts be awarded only to "responsible prospective contractors". Thus, before a prospective contractor is approved by the City, the prospective contractor must show that it "has the capability in all respects to perform fully the contract requirements and the business integrity to justify the award of public tax dollars." See Section 2-08 of the Board Rules. Some of the factors considered by the City in determining whether a prospective contractor is responsible include its financial resources, technical qualifications, experience, organization, material, equipment, facilities and personnel resources and expertise to carry out the work, a satisfactory record of performance, a satisfactory record of business integrity and other factors. Id.

43. In addition, with respect to contracts over $100,000, prospective contractors and their principals must complete and file certain questionnaires known as "VENDEX questionnaires" in order to prequalify as potential contractors. The completion and filing of these questionnaires and the subsequent investigation by the Department of Investigation of the City of New York insures that businesses and persons with a criminal background are excluded from the City contract procurement process.

44. Some of the underlying purposes of the Board Rules are to make as consistent as possible the uniform application of the procurement policies and practices throughout New York City agencies, to ensure fair and equitable treatment of all persons who deal with the procurement system of the City of New York, to increase efficiency and foster broad-based competition from all segments of the vendor community, to safeguard the integrity of the procurement system and protect against corruption, waste, fraud, and abuse. Such rules

are also intended to ensure appropriate public access to the contracting information and to foster equal employment opportunities in the policies and practices of contractors and subcontractors wishing to do business with the City.

45. Thus, to the extent the Debtors contemplate assuming and assigning any of the three City Licenses, the Debtors and/or the proposed assignees of such licenses would have to comply with the Board Rules, the terms of the City Licenses and any other applicable local laws or rules. Until the proposed assignee of the City Licenses complies with these requirements and the City approves such assignee, the City Licenses cannot be assigned under Section 365(c) of the Bankruptcy Code.

C. The Sale and Assignment of the Leasehold Interests And The Sale of Personal Property Is Not Exempt From Any Applicable Transfer Taxes Under Section 1146(c) of the Bankruptcy Code

46. In connection with their proposed auction of the Properties, the Debtors are also seeking by this Motion authorization for the sale of the Personal Property located at the Properties free and clear of liens with such sales to be deemed exempt from "stamp or similar taxes" pursuant to § 1146(c) of the Bankruptcy Code.

47. The City is not aware of any local laws that may render § 1146(c) of the Bankruptcy Code applicable to a sale of Personal Property. The language "stamp or similar tax" found in § 1146(c) of the Bankruptcy Code has been interpreted to refer to stamp or similar taxes imposed in connection with a transfer of realty or leasehold interests and the recording of instruments relating thereto. Thus, this tax exemption should not apply to a sale of Personal Property. See 995 Fifth Avenue Assocs., L.P., 963 F.2d 503, 510 (2d Cir. 1992), discussing the characteristics of stamp taxes.

48. To the extent the relief sought by the Debtors with respect to the tax exemption found in § 1146(c) of the Bankruptcy Code relates only to sales of Personal Property located at Properties outside the City of New York, the City respectfully requests that any Order granting the Debtors the relief sought in the Motion, make clear that such tax exemption, if any, does not apply to sales of Personal Property located at Properties within New York City.

49 Moreover, the tax exemption found in § 1146(c) of the Bankruptcy Code does not apply at all to any pre-confirmation sales. Thus, the proposed sale and assignment of any Owned Properties and Leases within New York City cannot be held to be exempt from City Transfer Taxes Properties pursuant to § 1146(c) of the Bankruptcy Code because such sales or assignments are not under a plan confirmed or rendering effective the consummation of a confirmed plan as required by binding Second Circuit precedent. See City of New York v. Jacoby-Bender, Inc. (In re Jacoby-Bender, Inc.), 758 F.2d 840, 841 (2d Cir. 1985)

50. After reviewing the legislative history of § 1146(c) of the Bankruptcy Code and of its predecessor, § 267 of the Bankruptcy Act, the Second Circuit in Jacoby-Bender held the debtor's sale of property in that case exempt from transfer taxes under § 1146(c) of the Bankruptcy Code because "consummation" of the debtor's already confirmed plan "depended almost entirely upon the sale of the building". Thus, Jacoby-Bender involved a post-confirmation sale and the tax exemption in that case was consistent with Congress's apparent purpose in enacting § 1146(c) of the Bankruptcy Code "to facilitate reorganizations through giving tax relief". The result reached in Jacoby-Bender was also consistent with the original purpose for which old section 267 was enacted, i.e., "to execute or make effective a plan confirmed under Chapter X".

51. Departing from the Jacoby-Bender holding and the Congressional intent in enacting § 1146(c) of the Bankruptcy Code, subsequent lower court decisions gradually enlarged the scope of § 1146(c) of the Bankruptcy Code to encompass pre-confirmation sales of property outside of the debtors' ordinary course of business under plans of reorganization ultimately confirmed. See In re Smoss Enters. Corp., 54 B.R. 950 (Bankr. E.D.N.Y. 1985); In re Permar Provisions, Inc., 79 B.R. 530 (Bankr. E.D.N.Y. 1987); In re United Press Int'l, Inc., 1992 Bankr. LEXIS 842 (Bankr. S.D.N.Y. 1992).

52. This "flawed interpretation" of the scope of § 1146(c) of the Bankruptcy Code was recently criticized by the Fourth Circuit in its recent decision of NVR Homes, Inc. v. Clerks of Anne Arundel County (In re NVR, LP), 189 F.3d 442, 456 (4th Cir. 1999), cert. denied, 2000 U.S. LEXIS 596, 120 S. Ct. 936, 145 L.Ed 2d 815 (2000). The Fourth Circuit stated:

> We do not take issue with the Second Circuit's logic as it was applied in *Jacoby-Bender* because it was employed to interpret a *plan* – i.e., to *identify which transfers* were necessary to, and thus contemplated by, "a plan confirmed."
>
> Lower courts, however, have extended the Second Circuit's language and altered *Jacoby-Bender*'s holding, changing the test from "necessary to the consummation of a plan," to "necessary to the confirmation of a plan." [citing Smoss Enters.] … Courts began using this seemingly slight alteration of the Second Circuit's language – "confirmation" for "consummation" – and applied it to the interpretation of the scope of § 1146(c) itself, rather than just a plan's provisions.
>
> The fundamental difference between the consummation of a plan and the confirmation of a plan is the timing of the events within the bankruptcy process. Consummation or execution of a reorganization plan cannot take place until the bankruptcy court first confirms a plan. *See* Fed. R. Bankr. P. 3020, 3022. By changing and applying *Jacoby-Bender*'s holding to new and different

> circumstances, courts used this altered analysis not only to determine what transfers were "under a plan", but also what transfers were "under a plan confirmed." These decisions embraced the belief that if a transfer was "essential to the confirmation of the plan," then it was "under a plan confirmed." [citing Permar]. Naturally, many preconfirmation transfers then were held to fall under § 1146(c), something that the Second Circuit never held. … We think it is error to twist the Second Circuit's language to the defeasance of § 1146(c)'s own terms.
>
> Although § 1146(c) relies upon the interpretation of a reorganization plan to determine which transfers fall within the scope of the plan itself, § 1146(c) determines the ultimate extent of its operation. Therefore, holding that every transfer "essential" to a plan's *confirmation* is by definition "under a plan confirmed" is fundamentally flawed. Such a holding makes a plan's terms the master of § 1146(c), instead of deferring to the statute itself. Accordingly, we believe the proposition that every transfer necessary to the confirmation of a plan is "under a plan confirmed" to be without basis in § 1146(c).

53. Relying on the plain meaning of § 1146(c), which speaks of a transfer "under a plan confirmed" and guided by a "restrictive" interpretation of the tax exemption, as directed by the Supreme Court's holding in California State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 104 L.E.2d 910, 109 S. Ct. 2228 (1989)[7], the Fourth Circuit in NVR agreed with the taxing authorities that "transfers taking place prior to the date of a reorganization plan's confirmation [were] not covered by § 1146(c)." 189 F.3d at 456-57. Noting that tax

[7] The Supreme Court in Sierra Summit stated: "although Congress can confer an immunity from state taxation, … a court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed." Id. at 851-52. (citations and internal quotation marks omitted).

exemptions should be construed narrowly in favor of the taxing authority, the NVR court stated: "It follows that we cannot allow private parties, who would fervently pursue every possible tax advantage, to interpret and extend statutory tax exemptions through the auspices of a reorganization plan, even if the plan is eventually confirmed by a court."

54. In 995 Fifth Avenue Assoc., L.P. v. New York State Dept. of Taxation and Finance (In re 995 Fifth Avenue Assoc., L.P.), 963 F.2d 503, 510 (2d Cir.), cert. denied, 506 U.S. 947, 113 S. Ct. 395, 121 L. Ed.2d 302 (1992), the Second Circuit also disagreed with the lower court's liberal interpretation of the scope of § 1146(c) of the Bankruptcy Code in that case. In reviewing the scant legislative history of § 1146(c) of the Bankruptcy Code and the language of the predecessor provision (§ 267 of the Bankruptcy Act) in order to determine if "gains tax" was a "stamp tax or similar tax", the Second Circuit stated:

> We disagree with the district court to the extent it concluded that this statement reflects Congress's intent that the words "stamp or similar tax" be read broadly to accord greater tax relief for debtors. Instead, we regard this statement as a simple declaration that the new provision, § 1146(c), enlarges the former exemption under § 267 to include taxes similar to stamp taxes.

189 F.3d at 457. Accord In re Kerner Printing Co., 188 B.R. 121, 124-25 (Bankr. S.D.N.Y. 1995) (citing California State Board of Equalization, supra, and agreeing with the City that a plan which encompassed sales of condominium units among non-debtors was not entitled to tax exempt status under § 1146(c) of the Bankruptcy Code)

55. This Court should follow Jacoby-Bender[8] and NVR and hold that only post-confirmation transfers of real property necessary to the consummation of the confirmed plan and rendering that plan effective are exempt from City Transfer Taxes under § 1146(c) of the Bankruptcy Code. As the Supreme Court has explained, "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." BFP v. Resolution Trust Corp., 511 U.S. 531, 537, 114 S. Ct. 1757, 128 L. Ed.2d 556 (1994).

56. Section 1146(c) of the Bankruptcy Code states that the delivery of an instrument or a transfer of property "under a plan confirmed under section 1129 of this title" is exempt from stamp tax or similar taxes. It is not debatable that if Congress intended to grant a stamp tax exemption in all cases where a plan is ultimately confirmed it could have used other language, such as "under a confirmable plan", "under a plan to be confirmed", "under a plan which shall be confirmed", "under a plan which is to be confirmed", "under a plan subject to confirmation" or other similar language. Cf. § 1129 of the Bankruptcy Code. That is not what Congress stated.

57. "Absent more explicit guidance from either the text or the legislative history, we must interpret the words used by Congress in accordance with 'their ordinary, contemporary, common meaning."' 995 Fifth Avenue, 963 F.2d at 510 quoting Perrin v. United States, 444 U.S. 37, 42, 100 S. Ct. 311, 314, 62 L.Ed.2d 199 (1979); Jacoby-Bender, 758 F.2d at 842 (interpreting the word "transfer" in § 1146(c) of the Bankruptcy Code in accordance with its

[8] The Second Circuit in Jacoby-Bender concluded: "A sale in general, following on confirmation of a plan, serves to make the plan effective. At the least, this sale did." (Emphasis added). 758 F.2d at 842.

ordinary meaning); In re New Haven Projects Ltd. Liability Co., 225 F.3d 283 (2d Cir. 2000) (interpreting the word "may" in § 505 of the Bankruptcy Code in accordance with its ordinary meaning).

58. The ordinary meaning of the term "confirm" is "to make firm", "to make valid by formal assent", "to complete by a necessary approval". See Webster's Third New International Dictionary of the English Language (G&C Merriam Co. 1971) at pp. 476. The term "confirmed" is defined in Webster's as "having received the rite of confirmation" or "made firm or established". Id. In contrast, the term "confirmable", which is not used in § 1146(c), means "capable of being confirmed". Id. Clearly then, the ordinary meaning of the terms "under a plan confirmed" found in § 1146(c) is under a plan that has already been confirmed by the court as having met the confirmation requirements set forth in § 1129 of the Bankruptcy Code.

59. Therefore, based on the plain language of § 1146(c) of the Bankruptcy Code, its legislative history and binding Second Circuit precedent, this Court should hold that § 1146(c) tax exemption from stamp or similar taxes is applicable only to post-confirmation transfers of real property necessary to the consummation of the confirmed plan and rendering such plan effective. In this case, the sales and assignments of the Properties and of the Personal Property located at Properties within New York City cannot be deemed to be "under a plan confirmed", nor "necessary to the consummation of a confirmed plan". Accordingly, the Debtors or any other parties approved as assignees of the Properties located within New York City should pay all applicable City Transfer Taxes in connection with the assignment of the Properties.

WHEREFORE, the City respectfully requests that the Court deny the Debtors' Motion to the extent (A) the Debtors refuse or are unable to cure the existing defaults in the City Licenses, (B) the Debtors purport to assume and assign the City Licenses to persons or entities not previously approved in writing by the City in violation of the express terms of the City Licenses and the Board Rules of the City of New York, and (C) the Debtors seek to have the sale of the Properties and/or of the Personal Property located at Properties within New York City exempt from City Transfer Taxes under § 1146(c) of the Bankruptcy Code, and (D) grant the City such other and further relief as it may deem just and proper.

Dated: New York, New York
January 18, 2001

MICHAEL D. HESS
Corporation Counsel of the City of New York
Attorney for the City of New York
Department of Parks and Recreation
100 Church Street, Room 6-133
New York, New York 10007
(212) 788-0843

By: /s/ Gabriela P. Cacuci
Gabriela P. Cacuci (GC 4791)
Assistant Corporation Counsel

CERTIFICATION OF SERVICE

I, Gabriela P. Cacuci, an attorney admitted to practice before the courts of the State of New York, do hereby certify that on January 18, 2001, I transmitted a true copy of the Objection of the City of New York Department of Parks and Recreation to the Debtors' Motion dated January 11, 2001 for an Order Pursuant to Sections 105, 363, 365 and 1146 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006 and 6007, Authorizing, inter alia, the Assumption and Assignment of Certain Leasehold Interests, the Sale of Personal Property, Free and Clear of Liens, Claims, Encumbrances, and Interests, and for other relief, by facsimile transmission upon the following parties:

GOLENBOCK, EISMAN, ASSOR & BELL
437 Madison Avenue
New York, New York 10022
Attn: Jonathan L. Flaxer, Esq.

OFFICE OF THE UNITED STATES TRUSTEE
33 Whitehall Street, 21st Floor
New York, New York 10004
Attn: Brian Shoichi Masumoto, Esq.

BERLACK, ISRAELS & LIBERMAN LLP
120 West 45th Street
New York, New York 10036
Attn: Edward S. Weisfelner, Esq.

MORGAN, LEWIS & BOCKIUS
101 Park Avenue
New York, New York 10178-0060
Attn: Richard S. Toder, Esq.

Dated: New York, New York
January 18, 2001

/s/ Gabriela P. Cacuci_____
GABRIELA P. CACUCI (GC-4791)